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No. 837

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1965

PARNELL BOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Government's brief in opposition to petition for a writ of certiorari is, in the main, directed to two points:

1) That the petition is out of time under Rule 22(2) of this Court;

2) That the falsity of the affidavit upon which the search warrant was issued, which falsity is admitted by the government, was not raised by petitioner at the trial, and, therefore, petitioner is entitled to no relief.

The government's opposition brief touches upon other issues raised in the petition for a writ, but developed nothing to counter the arguments of petitioner on these other points. Hence, petitioner does not reply to such other matters, relying upon his petition.

The two points will be argued in inverse order in this reply brief.

ARGUMENT

The Government in its opposition brief was content, as was the Sixth Circuit Court of Appeals, to deny petitioner substantial, constitutional rights on the narrow proposition that the issue of the falsity of the affidavit for a search warrant was not made an issue in the trial Court, although admitting "that the affidavit was inaccurate" (p. 4, Gov't brief).

Petitioner is taken aback at the Government's contention that the petition for a writ of certiorari should be denied because:

1. On the hearing on the motion to suppress, no testimony was elicited concerning *oral statements that may have been made to the issuing magistrate* (p. 4, Gov't brief);

2. The record does not state whether the searches of two other premises were completed before or after the warrant issued (p. 4, Gov't brief):[1]

3. The record does not reveal whether the issuing magistrate "was made aware of exactly what the informer had told the affiant" (p. 4, Gov't brief).

The Government's argument on each of these matters is irrelevant and contrary to the long history of the law of search and seizure that the affidavit must embody in it all the facts necessary for a magistrate to issue a search warrant. *Aguilar* v. *Texas,* 378 U.S. 109; *Jones* v. *U. S.,* 362 U.S. 257. *What the affiant may or may not have told the magistrate is not what counts.*

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[1] The record shows that these two searches were based on warrants issued by another magistrate, the Judge of the City of Newport, Kentucky Police Court, but they produced nothing. The Court of Appeals in its opinion said "the searchers drew blanks", further evidence that the entire procedure was a "fishing expedition" and taken as "a flyer" as set forth in the motion to suppress, and admitted to be so by affiant Scully (p. 10, Petition; pp. 20a-21a, Appendix on file with the Clerk of this Court).

On page 5 of its brief, the Government would again deny petitioner substantial, constitutional rights on the theory that "petitioner objected when the government attempted to interrogate the affiant on his "good faith", referring to page 32a (A. 32) of petitioner's appendix on file with the Clerk of this Court. The record does not support the government's statement. "Good faith" of affiant Scully was not then an issue; Scully had already admitted that the substantial untruths he put in the affidavit were not told him by the informant. It was when the Government sought to inject the *belief* of the affiant, and sought to include the "home of Parnell Bowling", when the questioning had been concerning two other places — the drug store and a store under construction across from the drug store, that petitioner objected. It was the trial judge (32a) that said "what he (Scully) believed or what he knew or what he thought he knew or what he had information about, all of that must be reflected in the affidavit of the search warrant."

The Government further argues that petitioner's motion to suppress did not "particularize" the objections asserted by petitioner, and "did not challenge specific allegations" (pp. 4-5, Gov't brief). Petitioner in his motion to suppress gave as one of the grounds that the affidavit for the search warrant was made *"without basis in fact"*. This was a direct attack at the very heart of the affidavit which stated "affiant's reasons" for asking the magistrate to issue a search warrant, and the falsity of which reasons the Government admitted, saying on page 4 of its brief that "it is true that the affidavit was inaccurate insofar as it stated that the informant had identified particular machines and had seen them at petitioner's home . . ." This statement in the affidavit was the very heart and guts of the affidavit. Without it no search warrant could have issued to search peti-

tioner's home. And when the motion to suppress set up the issue that the affidavit was made *"without basis in fact"*, it had only one plain, logical meaning — the affidavit was NOT TRUE, in other words, it was false. So that the issue was raised in the trial court, notwithstanding the Government's subtle attempt to side-track or minimize it by substituting the word "inaccurate" for false. It was this very issue of placing a known, deliberate false statement in the affidavit by the affiant, which the Court of Appeals called "the more formidable problem posed by this case", but which it refused to decide. And the Government would have this Court dodge it also!

Eliminating all the semantics by the Government which, on the one hand, claims to deplore the use of "highly technical attacks", yet it is the Government itself which would have this Court uphold the Sixth Circuit's use of a "highly technical" reason for failure to rule on the merits of the issue, which it should have done by invoking the "plain error" rule. Rule 52(b), Fed. R. Crim. Proc.

The Government next contends (p. 5, Gov't brief) that because "two pieces of stolen property in the informant's possession had been positively identified, and that informant stated that petitioner sold and had many other items at his drugstore", that, therefore, affiant (Scully) "could reasonably conclude that petitioner was a receiver of stolen business property". The Government then goes from this false major premise to argue that "this information constituted probable cause to search petitioner's residence as well as his place of business" (p. 6, Gov't brief). Neither the premise nor the conclusion is correct.

What the affiant (Scully) may or may not conclude is not the test for determining the sufficiency of an affidavit for a search warrant. The subjective conclusions are not only

irrelevant, but, we submit, had his conclusion been put in the affidavit itself for a magistrate to evaluate and judge, the affidavit still would not have been valid, because an affidavit based upon conclusions is a nullity. *Aguilar* and *Jones, supra.*

In the overall picture of this case lies the uncontroverted fact that affiant Scully knowingly gave a false affidavit by which means he secured a search warrant. The real issue is whether this Court will tolerate the doing by indirection and falsity what could not have been done directly and by truth. To permit such deception and use of falsity, places in the hands of an over-zealous officer the power to do away with "probable cause". We submit it was the honest, conscientious officer of the law, working in haste, this Court sought to protect by the *Ventresca* case, so that his work would not be undone by "highly technical attacks". It did not intend, we believe, to place in the hands of an officer of the law, the power to deliberately use known falsity as a means of depriving a person of his rights under the Fourth Amendment and under Rule 41(c), Rules of Criminal Procedure.

CIRCUMSTANCES IN THIS CASE CALL FOR THE WAIVER BY THIS COURT OF ITS THIRTY DAY FILING RULE, AND CONSIDERATION BY IT OF THE PETITION ON THE MERITS.

The Government states that the filing of the petition for a writ of certiorari is out of time under Rule 22(2) of the Rules of this Court, inferring that this is jurisdictional, and, therefore, the petition should not be considered on its merits.

We urge the Court to consider the petition on its merits not only because of the important issues raised, but because

there is ample reason in this case for this Court to waive its rule, based upon the unusual and unique circumstances which brought about the filing of the petition beyond the thirty days after the order of the Sixth Circuit denying the petition for a rehearing.

The necessity for filing a petition for a writ of certiorari in a criminal case within thirty days is not statutory, as it is under 28 U.S.C. 2101, which provides for a ninety day period in civil cases. The thirty day filing is a rule of this Court. As such, it should, under proper and just circumstances, and in order to promote justice, be waived. Moreover, Rule 22(2) itself provides that for good cause the time for applying for a writ of certiorari may be extended for a period not exceeding thirty days. The petition in this case was filed within this "extended" thirty day period.

The "good cause" relied upon by petitioner is: Attorneys Weintraub and Schear, who tried the case in the District Court, and who briefed and argued the case in the Sixth Circuit Court of Appeals were not admitted to the Supreme Court. Request was made of Attorney Thomas D. Hirschfeld, of Newport, Kentucky, who was admitted to practice in this Court, to associate himself with Attorneys Weintraub and Schear in seeking a writ of certiorari. Attorney Hirschfeld agreed, with the stipulation that any petition or brief prepared by Weintraub or Schear would first be presented to him before being filed. The petition for a writ of certiorari was prepared by Weintraub and Schear well within the thirty days after the denial by the Sixth Circuit of the petition for a rehearing, and in sufficient time for it to have been filed in this Court within the thirty days.

Upon the denial of the petition for a rehearing, a motion was filed in the Sixth Circuit Court of Appeals for a stay of

the mandate. On November 26, 1965, the Office of the Clerk, United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio, sent the following letter to Attorneys Weintraub and Schear:

Carl W. Reuss
Clerk

16,226

UNITED STATES COURT OF APPEALS
For the Sixth Circuit
Cincinnati, Ohio 45202

November 26, 1965

Mr. Morris Weintraub
321 York St.
Newport, Ky.
Mr. Charles J. Schear
502 Finance Bldg.
Newport, Ky.

Re: United States of America
vs. Parnell Bowling
No. 16,226

Gentlemen:

Please be advised that an order was entered today, staying the issuance of mandate in this case for thirty (30) days from this date, provided that the petition for writ of certiorari is filed in the Supreme Court within such thirty day period.

I call your attention to the fact that the order staying the mandate does not extend the time for filing the petition for certiorari. That time is fixed by statute. See 28 U.S.C. § 2101.

Yours very truly

Carl W. Reuss, Clerk
(Signed) Helen Toohey, Deputy Clerk

cc: Hon. George I. Cline
United States Attorney
Federal Bldg., Lexington, Ky.

A photo copy of the letter is attached as an Appendix to this reply brief.

Two things are significant: Paragraph one of the letter gave the impression that petitioner had *within* 30 days after the date of the letter, November 26, 1965, the date the mandate was stayed, to file a petition for a writ of certiorari; this would give up to December 26, 1965. Paragraph two of the Clerk's letter advised that 28 U.S.C. § 2101 governed the time for filing a petition for a writ of certiorari; Section 2101 allows for a ninety day filing period.

Counsel for petitioner, in good faith, took the letter from the Clerk to mean that a petition for a writ could be filed up to December 26, 1965, being "within such thirty day period" referred to in paragraph one. Furthermore, counsel fell into the same error as did the Office of the Clerk of the United States Court of Appeals for the Sixth Circuit, in not noting that the ninety day filing period of Section 2101 applied to civil actions, and not to criminal matters!

Compounding this series of events, was the fact that Attorney Hirschfeld was then confined to a hospital. Not wishing to unnecessarily burden or disturb Mr. Hirschfeld at the hospital with this one matter, and being under the honest belief that additional time was still available, the brief was not submitted to Mr. Hirschfeld until a later date, at which time other matters relating to other cases were discussed with him. Mr. Hirschfeld approved the petition for a writ of certiorari, and it was filed on December 20, 1965. On January 14, 1966, Mr. Hirschfeld died!

It is most respectfully submitted that the thirty day filing period under Rule 22(2) should be waived by this Court in this case; or, in the alternative, that the facts and circumstances are such that the "good cause shown" provided for

in Rule 22(2) for extending the filing for an additional thirty days did then exist, and that the filing on December 20, 1965 was within the rule.

CONCLUSION

Petitioner respectfully submits that this Court consider the petition for a writ of certiorari as not being improperly filed out of time, and that the writ be granted.

MORRIS WEINTRAUB
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Newport, Kentucky 41071
OF COUNSEL
FOR PETITIONER

January 24, 1966

CERTIFICATE

Morris Weintraub and Charles J. Schear hereby certify that this reply brief is filed in good faith, and that the statements of fact contained in that portion of the argument relating to the contention of the Government that the petition was filed out of time are true and correct.

MORRIS WEINTRAUB

CHARLES J. SCHEAR

January 24, 1966

16,226

OFFICE OF THE CLERK

CARL W. REUSS
CLERK

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

November 26, 1965

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Yours very truly

Carl W. Reuss, Clerk

Helen Toohey
Deputy Clerk

HT

cc: Hon. George I. Cline
United States Attorney
Federal Bldg., Lexington Ky

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Now comes PARNELL BOWLING, Petitioner, and respectfully prays the Court to grant a rehearing, and to reconsider its order denying the Petition for a Writ of Certiorari.

Petitioner's home in Cold Spring, Kentucky was searched pursuant to a search warrant issued by the County Judge of Campbell County, Kentucky, on an affidavit made by a detective from the Cincinnati, Ohio police department. All the material allegations which had any material relevancy to the issuance of the search warrant were knowingly, falsely and fraudulently made by this detective.

Federal officers did not participate in the search or seizure. They had nothing to do with it, and knew nothing of it. The two business machines described in the indictment were turned over to the federal authorities by the state officers on a "silver platter".

A motion to suppress evidence was timely filed. Evidence was presented. It was overruled (4a-11a, 12a).

In his petition for a writ of certiorari, petitioner raised the question of admissibility of the evidence seized under a search warrant issued pursuant to an affidavit based upon statements knowingly, falsely and fraudulently made in order to obtain a search warrant, without which statements the search warrant could not issue. The Court of Appeals for the Sixth Circuit decided this issue on the narrow proposition that petitioner had not "specifically presented" it to the trial Court. This Court refused to grant certiorari on this issue, as well as the other issues raised in the Petition that the affidavit for a search warrant did not state sufficient facts to establish probable cause, nor did the search warrant sufficiently describe and identify the property to be seized.

This Petition for Rehearing now brings before this Court the proposition that the search warrant was executed in an unreasonable manner. This issue was presented in petitioner's brief in the Sixth Circuit. The Sixth Circuit did not pass upon it. It was a substantial ground available to petitioner although not previously presented to this Court in his petition for a writ of certiorari. Rule 58.

Petitioner contends that unauthorized and unnecessary persons invited by the Campbell County, Kentucky police to search and seize property at petitioner's home, tainted the evidence obtained and made the search and seizure unreasonable under the Fourth Amendment.

The search warrant (9a) was directed "To the Chief of Police of the County Police or to the Sheriff of Campbell County, Kentucky, or his Deputies or any other Campbell County Officer."

On April 2, 1963, two Campbell County Police brought into petitioner's home in Cold Spring, Kentucky, two City

of Cincinnati, Ohio detectives, and detectives from the City of Newport, Kentucky (36a, 39a, 40a).

On April 3, 1963, two City of Newport detectives and two Newport jail prisoners went into petitioner's home in Cold Spring, Kentucky, and began removing articles *before* any Campbell County police officer had arrived on the scene (58a, 59a). These unauthorized persons actually dominated and controlled the search and seizure in petitioner's home. The two Cincinnati, Ohio detectives searched the basement, taking down serial numbers on articles (36a, 40a, 41a, 42a). City of Newport, Kentucky detectives hired a moving van (47a) to remove the articles from petitioner's home.

The only authorized authorities under the search warrant were the "Chief of Police of the County Police, or the Sheriff of Campbell County, Kentucky, or his Deputies or any other Campbell County officer." The record, however, shows that the seizure was made by Cincinnati, Ohio detectives, City of Newport detectives, and two jail prisoners.

City of Newport, Kentucky police officers did not fall within the category of persons directed by the search warrant to search and seize at petitioner's home. Moreover, petitioner's home was located in Cold Spring, Kentucky, which is outside the municipal limits of the City of Newport, Kentucky. City of Newport officers have no jurisdiction outside the limits of the City of Newport. *Brittain* v. *U. S. F. & G.*, 293 SW 956, 219 Ky 465. Without question, City of Cincinnati, Ohio detectives, and two jail prisoners from the City of Newport, Kentucky jail, had no authority to be in the home of petitioner.

Petitioner recognizes that police authorized to make a search may take along persons for the purpose of identifying property for which a search warrant was issued. *Romeror* v. *Squier,* 133 F.2d 528. In this case the serial

PETITION FOR REHEARING

numbers of business machines were listed in the affidavit for a search warrant (8a), and there was no valid or cogent reason for Cincinnati, Ohio or Newport, Kentucky police to be there.

The right to conduct a reasonable search and seizure does not carry with it a right to invade a home with an army of unauthorized persons, nor does it contemplate that petitioner must suffer the indignity of having two prisoners from another city remove property therefrom. Such tactics are calculated to produce fear, not justice. They reek with the odor of a totalitarian police state. It is repugnant to the Fourth Amendment.

CONCLUSION

This Petition for Rehearing should be granted, and the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

MORRIS WEINTRAUB
321 York Street
Newport, Kentucky
CHARLES J. SCHEAR
Finance Building
Newport, Kentucky
Of Counsel for Petitioner

CERTIFICATE OF COUNSEL

We certify that this Petition for Rehearing is presented in good faith and not for delay, and that the ground set forth is restricted to the grounds set forth in Rule 58.

MORRIS WEINTRAUB
CHARLES J. SCHEAR